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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,

Petitioner,

against

SHUBERT THEATRE CORPORATION, ET AL.,

Respondents.

Brief for Respondent Shubert Theatre Corporation, Shubert Theatrical Company and Lee Shubert in Opposition to Petition for Writ of Certiorari

WILLIAM KLEIN,
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MILTON R. WEINBERGER,
Of Counsel.

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INDEX

PAGE

STATEMENT OF FACTS 1

SUMMARY OF RESPONDENTS' ARGUMENT 4

POINT I—Petitioner has failed to comply with Rule 12 of this Court 4

POINT II—The disqualification of Judge Manton was not established 4

POINT III—Petitioner is guilty of laches 5

Table of Cases Cited

Berger *v.* United States, 255 U. S. 22 4

Borough of Hasbrouck, N. J. *v.* Agrios, 10 Fed. Supp. 371 5

Chaflin *v.* United States, 5 Fed. 2nd 592, cert. denied 269 U. S. 552 5

In re Honolulu Cons. Oil Co., 243 Fed. 348 5

Long *v.* Stites, 63 Fed. 2nd 855, cert. denied 290 U. S. 640 5

People *v.* Whitbridge, 144 App. Div. 493 4

Wiren *v.* Shubert, 5 Fed. Supp. 358, cert. denied 293 U. S. 591, reargument denied 293 U. S. 631 ..... 1, 2

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Statement of Facts

This is a petition from a decision of the United States Circuit Court of Appeals, Second Circuit dated May 13, 1942 denying petitioner's motion to vacate the decree of that Court dated May 21, 1934 affirming a decree of the District Court, Southern District of New York on the ground that Judge Martin T. Manton who presided in the Circuit Court was disqualified.

On October 31, 1933 Judge Henry W. Goddard, at the District Court, Southern District of New York, signed a judgment dismissing the complaint as to all defendants on the merits (R. pp. 5, 17; 5 Fed. Supp. 358). The com-

plaint sought to enjoin the defendants from presenting upon the stage or by means of motion pictures the play "Death Takes A Holiday" upon the ground that the said play was a plagiarism of petitioner's work "Most". The opinion of Judge Goddard speaks for itself. It reflects an amount of careful and painstaking research and indicates a close consideration not only of the respective works but also of the prevailing authorities. Judge Goddard gave ample reasons for dismissing the complaint.

The said judgment was affirmed by the Circuit Court of Appeals on May 21, 1934. Judges Martin T. Manton, Thomas W. Swan and Harrie B. Chase heard and decided the appeal (R. pp. 5, 17).

The United States Supreme Court on October 8, 1934 denied plaintiff's application for a writ of certiorari (R. p. 17; 293 U. S. 591). A rehearing was denied on November 5, 1934 (R. p. 17; 293 U. S. 631).

The Circuit Court of Appeals which denied plaintiff's motion for a vacatur of the judgment of affirmance of May 21, 1934 consisted of Thomas W. Swan as Presiding Judge and Judges Charles E. Clark and Jerome F. Frank (R. p. 3).

Petitioner sought to link defendant Paramount, who produced the motion picture version of "Death Takes A Holiday", with Judge Manton through one Albert D. Lasker, it being charged that Lasker, a member of the Board of Directors of Paramount, made a loan of $250,000 to Judge Manton (R. p. 5). Lasker was a member of said Board from November 9, 1931 to January 17, 1933, eight months before the case was decided by Judge Goddard, and sixteen months before the affirmance by the Circuit Court of Appeals (R. p. 25). During the period of litigation Lasker owned but 33 shares out of 3,000,000 shares of

common stock of Paramount (R. p. 2). Lord & Thomas, an advertising agency which represented Paramount, and which Lasker allegedly owned (R. p. 5), did not own any stock of Paramount (R. p. 50). During the time of the appeal, Paramount was in the hands of reorganization trustees (R. pp. 29, 2). The amplification of these facts we leave for Paramount's counsel.

With respect to the Shubert respondents, who were engaged in presenting plays upon the stage, no charge is made that they had any dealings directly or indirectly with Judge Manton. The nebulous and vague charges are made, apparently for whatever they might be worth, that $25,000 was paid to him in connection with certain Cinema Patent Co. Inc. litigation by one Robert Newman "a man in the theatrical business"; and that one William J. Fallon, who allegedly made arrangements for Judge Manton, was the owner of a large theatre ticket concern (R. p. 7). The Shuberts categorically deny that there was any connection between them and Newman or Fallon relating to this case, and emphatically state that they had no dealings, directly or indirectly with Judge Manton (R. pp. 55-56).

Judge Manton was indicted in April 1939; his judicial misconduct had been referred to in the press for fully a year prior thereto; he was tried and convicted on June 3, 1939 and his conviction affirmed the same year (R. p. 56). Yet plaintiff did nothing for three years, giving as the only reason that her counsel, who is her brother, because of her illness was prevented "in many ways" from giving his attention to the case (R. p. 4).

Summary of Respondents' Argument

I. Petitioner has not complied with Rule 12 of the Rules of the United States Supreme Court.

II. The disqualification of Judge Manton was not established.

III. Petitioner is guilty of laches.

POINT I

Petitioner has failed to comply with Rule 12 of the rules of this Court, and this petition should therefore be dismissed.

POINT II

The disqualification of Judge Manton was not established.

The interest, requisite for disqualification, must be real, certain, not merely possible or contingent, it must be demonstrable and capable of precise proof (*People* v. *Whitbridge,* 144 App. Div. 493). The innuendo that the Shuberts were connected with Judge Manton because the latter had dealings with Newman who was "in the theatrical business" and Fallon who was "acquainted with people in the theatre industry" does not satisfy that test, but is no more than rumor or gossip. This is not sufficient upon which to base disqualification (*Berger* v. *United States,* 255 U. S. 22).

Nor is mere interest alone sufficient. The interest must have some relation to the particular litigation (*In re Honolulu Cons. Oil Co.*, 243 Fed. 348), or as the Circuit Court of Appeals said, in denying plaintiff's motion, "the disqualification must be directly connected with the very case on appeal" (R. p. 2). Neither Lasker, Newman or Fallon were parties to the action. No claim was made that Newman or Fallon were stockholders or in any way connected with any of the respondents. Lasker's sole relation was as the owner of 33 shares, out of 3,000,000 shares, of the common stock of respondent Paramount. At that time Paramount was in reorganization. The Shubert corporations were in equity receivership. Lasker's interest was too remote and indirect to disqualify Judge Manton (*Long* v. *Stites*, 63 Fed. 2nd 855, certiorari denied 290 U. S. 640).

POINT III

Petitioner is Guilty of Laches.

Petitioner did nothing for three years after Judge Manton's misconduct became public knowledge. The challenge must be made at the first opportunity after discovery of the facts (*Chaflin* v. *U. S.*, 5 Fed. 2nd 592, certiorari denied 269 U. S. 552; *Borough of Hasbrouck, N. J.* v. *Agrios*, 10 Fed. Supp. 371). Petitioner does not deny that for several years she had knowledge of the facts upon which she relies, but feebly attempts to explain her delay upon the conclusory claim of illness. Suffice it to say that the Circuit Court of Appeals found the delay "not adequately explained" (R. p. 2).

The respondents therefore respectfully submit that the petition for a writ of certiorari should be denied, with costs.

Dated, New York, New York, September 4, 1942.

Respectfully submitted,

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